

STATE OF HAWAII
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
Honolulu, Hawaii

REF:OCCL:DH

File No.: KA-3399

July 22, 2009

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: First Time Extension Request Conservation District Use Permit (CDUP) KA-3399 for Morrow Single Family Residence (SFR)

APPLICANT: Max Graham, C/O Belles, Graham, Proudfoot, Wilson & Chun LLP, Watumull Plaza, 4334 Rice Street, Suite 202, Lihue, Kauai, 96766

LANDOWNER: David M. and Linda B. Morrow

LOCATION: Haena, Island of Kauai

TMKs: (4) 5-9-003:010 and 045

AREA OF PARCELS/ TMK: 010 approximately 7,112 square feet
TMK: 045 approximately 38,555 square feet

SUBZONE: Resource and Limited

BACKGROUND:

On February 2, 2007, CDUA KA-3399 was accepted by the Department of Land and Natural Resources (DLNR) for the Morrow SFR. The action proposed to: 1) consolidate two subject parcels TMK: (4) 5-9-003:010 (approximately 7,112 square feet) and TMK: 045 (approximately 38,555 square feet) into one subject parcel; 2) construct a two story, 3,480 square foot SFR (four bedrooms, four bathrooms, kitchen, living room, dining room, and game room (downstairs); install a waste water system; install utilities; construct a bridge; and landscaping (vegetation and foot paths).

Staff ultimately recommended the BLNR deny CDUA KA-3399 for failure to: 1) meet Section 13-5-24, HAR, R-8, SINGLE FAMILY RESIDENCE, D-1; 2) meet Section 13-5-41, HAR, SINGLE FAMILY RESIDENCES; STANDARDS; 3) meet the Conservation District criteria, pursuant to Section 13-5-30, HAR; 4) complete the

Chapter 343, HRS, review process; and 5) meet the BLNR policy regarding Haena Hui Policy.

Subsequently a Contested Case KA-08-01 was requested. The DLNR settled Contested Case KA-08-01, and the settlement agreement was signed on June 27, 2008. Condition twelve (12) provided that any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been approved by the Department of Land and Natural Resources (Department); and unless otherwise authorized, shall be completed within three years of the approval. The applicant shall notify the Department in writing when then construction activity is initiated, and when it is completed.

Time Extension Request:

On June 19, 2009, the applicant's lawyer, Max Graham, submitted a request for a nine (9) month time extension to commence work; the deadline to initiate construction would be on **March 26, 2010 (Exhibit 1)**.

AUTHORITY FOR GRANTING TIME EXTENSIONS:

The authority for granting time extensions is provided for in Section 13-5-43 (d), Hawaii Administrative Rules (HAR), which states:

“All time extensions shall be submitted to the Department thirty days before the expiration deadline. If a request is received less than thirty days before the due date, the request shall be forwarded to the Board for review.”

Staff notes the time extension request was submitted less than thirty days before the due date, thus the request is being forwarded to the BLNR.

BASIS FOR TIME EXTENSIONS:

A time extension may be sought when a applicant is unable to initiate a project within the stipulated time frame. The BLNR grants time extensions when an applicant demonstrates some sort of hardship or delay in completing work on the project. Moreover, the applicant should be able to demonstrate that the hardship or delay was not self-imposed and that some good faith effort has been made to complete the project.

DISCUSSION:

Staff notes the department approved the construction plans for CDUP KA-3399 on September 9, 2008. Kauai County departments, with the exception of the Department of Water (DOW), approved the construction plans. The DOW required a water meter for the SFR (installed on Kuhio Highway). The water meter and accessory plans (water plans, water lateral plans) required the approval of the State Department of Transportation

(DOT), and DOW. The Board of Water Supply required a Conveyance of Water Facilities document and the approval of the Water Board. After approval, the DOW will install the water meter, approve the plans, Building Permit, and issue a Class I Zoning Permit. The construction of the Morrow SFR can begin.

Staff notes the new deadline to initiate construction would be **March 26, 2010**. Staff notes the applicant did not request to extend the deadline to complete construction (currently June 27, 2011). Therefore, that deadline remains the same unless the applicant wishes to discuss the issue at the Land Board meeting.

RECOMMEDATION:

Staff, therefore, recommends the following:

That the Board of Land and Natural Resources **APPROVE** an extension of nine (9) months to initiate construction of the Morrow Single Family Residence, subject to the following conditions:


1. That condition twelve of Contested Case KA-08-01 Settlement Agreement for CDUP KA-3399 is amended to provide that the deadline to initiate construction is now **March 26, 2010**, the deadline to complete construction is **June 27, 2011**;
2. That all other conditions imposed by the Board under Contested Case KA-08-01 Settlement Agreement for CDUP KA-3399 shall remain in effect.

Respectfully submitted,



DAWN T. HEGGER
Staff Planner

Approved for submittal:



LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

6487

**BELLES GRAHAM PROUDFOOT
WILSON & CHUN, LLP**

ATTORNEYS AT LAW

MICHAEL J. BELLES
MAX W.J. GRAHAM, JR.
DONALD H. WILSON
JONATHAN J. CHUN

Federal I.D. No. 99-0317663

WATUMULL PLAZA
4334 RICE STREET, SUITE 202
LIHUE, KAUAI, HAWAII 96766-1388

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FACSIMILE NO: (808) 245-3277
E-MAIL: mail@kauai-law.com

OF COUNSEL
DAVID W. PROUDFOOT
RECEIVED
COUNSEL
LORNA A. NISHIMITSU

09 JUN 23 P3 24
ASSOCIATE
WATUMULL PLAZA

DEPT OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

June 19, 2009

Ms. Laura H. Thielen, Chairperson
Board of Land and Natural Resources
State of Hawaii
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

VIA EMAIL & EXPRESS MAIL

Re: **Conservation District Use Permit KA-3399**
For the Morrow Living Trust Single Family Residence
Lot 111-A (formerly Lot 111 and Exclusion 15)
Haena Hui Partition
Haena, Kauai, Hawaii
Kauai Tax Map Key No. (4) 5-9-003:010 and 045
Owner: David M. Morrow, M.D., and Linda B. Morrow,
Trustees of the Morrow Living Trust under
Unrecorded Trust Agreement dated March 23, 1984

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2009 JUN 24 A 9:18
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Dear Chairperson Thielen and Board Members:

I am writing to you on behalf of David M. Morrow, M.D., and Linda B. Morrow, Trustees of the Morrow Living Trust ("Morrow Trust"), to request an amendment of Conservation District Use Permit KA-3399 ("CDUP"). The CDUP allowed the consolidation ("Consolidation") of two existing lots into one lot, and the construction of a single family residence ("Residence") on the consolidated lot (the "Lot").

The Morrow Trust is requesting that Condition 12 of the CDUP be amended by extending the time for commencement of work or construction of the proposed Residence from one year from the date of CDUP approval to 21 months from the date of CDUP approval (which will provide a 9 month extension). The CDUP was originally approved on June 27, 2008, and the present one year time requirement will expire on June 26, 2009. The requested nine (9) month extension will allow the Morrow Trust until March 26, 2010, to commence construction.

EXHIBIT 1 000L

Ms. Laura H. Thielen, Chairperson
Board of Land and Natural Resources
June 19, 2009
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In support of its request, the Morrow Trust provides the following information:

1. The Subject Property is located in Haena, Kauai, Hawaii, as shown colored in yellow on the enclosed Kauai Tax Map 5-9-03 (Exhibit "1").

2. The CDUP for the Residence was originally approved on June 27, 2008 (Exhibit "2").

3. The Office of Conservation and Coastal Lands approved the construction plans for the Residence ("Construction Plans") on September 9, 2008 (Exhibit "3").

4. The Construction Plans, together with a Building Permit Application and a Class I Zoning Permit Application, were submitted to the Planning Department of the County of Kauai on November 5, 2008, as shown on the enclosed Plan Tracking Status maintained by the County of Kauai ("Plan Tracking") (Exhibit "4").

5. As shown on the Plan Tracking, all of the governmental agencies have approved the Construction Plans with the exception of the Department of Water of the County of Kauai ("DOW"). DOW will not approve the Construction Plans until a water meter ("Water Meter") for the Residence has been installed on Kuhio Highway (a State Highway).

6. In order to have the Water Meter installed, the Morrow Trust has done or will need to do the following:

a. The Morrow Trust submitted plans ("Water Plans") for the construction of a water meter box and water laterals ("Water Facilities") to the State Highways Division of the State Department of Transportation ("DOT") and to DOW. These Water Plans were processed as follows:

(1) On August 13, 2008, the Morrow Trust submitted a Request For Service to DOW.

(2) On January 15, 2009, the Morrow Trust submitted the Water Plans to DOW and DOT.

(3) On January 30, 2009, DOT provided its comments to the Water Plans.

(4) On February 10, 2009, DOW provided its comments to the Water Plans.

(5) On March 19, 2009, revised Water Plans were submitted to DOW and DOT.

(6) On April 20, 2009, the final Water Plan tracings were delivered to DOW for signature.

(7) On May 18, 2009, the final Water Plan tracings were delivered to DOT for signature. DOT lost these tracings, and as a result a new set was delivered to DOT and DOW on June 16, 2009.

(8) The signed Water Plan tracings were sent to the Morrow Trust by DOT on June 18, 2009.

b. With the approval of the Water Plans, the Morrow Trust can now have the Water Facilities constructed.

c. Upon completion of the construction of the Water Facilities and inspection by State Highways and DOW, the Morrow Trust will need to prepare and submit a Conveyance Of Water Facilities document to the Board of Water Supply of the County of Kauai ("Water Board").

d. The Water Board (which meets twice a month) will need to approve and accept the Conveyance Of Water Facilities at one of its scheduled meetings.

e. Upon acceptance of the Water Facilities by the Water Board, DOW will then install the Water Meter.

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7. Upon installation of the Water Meter, DOW will approve the Plans, and the Building Permit and Class I Zoning Permit will be issued.

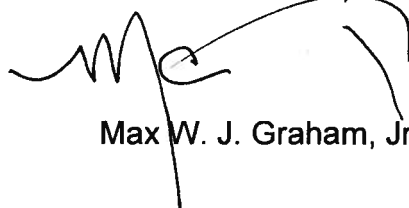
8. Upon issuance of the Building Permit and Class I Zoning Permit, the Morrow Trust will commence construction of the Residence.

9. As shown on the enclosed two photographs (Exhibits "5" and "6"), Wagner Engineering Services, Inc. has surveyed and staked the location of the Residence on the Lot. However, until the Building Permit and Class I Zoning Permit are issued, no further work can be done.

Thank you very much for your consideration of this request.

Sincerely yours,

BELLES GRAHAM PROUDFOOT
WILSON & CHUN, LLP

A handwritten signature in black ink, appearing to read 'Max W. J. Graham, Jr.', with a large, sweeping flourish extending from the end of the signature.

MWJG:jgm
Enclosures

cc: Dr. David M. Morrow, w/encls. (via email only)
Mr. Gary Tobey, w/encls. (via email only)

MARK J. BENNETT 2904
Attorney General of Hawaii

RANDALL K. ISHIKAWA 4116
Deputy Attorney General
Department of the Attorney
General, State of Hawaii
Kekuanaoa Building, Room 300
465 South King Street
Honolulu, Hawaii 96813
Telephone: (808) 587-2983
Facsimile: (808) 587-2999

Attorney for Respondent Department
of Land And Natural Resources

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case)	DLNR File KA-3399
Regarding Conservation District Use)	
Application (CDUA) KA-3399 for the)	SETTLEMENT AGREEMENT
Proposed Morrow Living Trust Single)	REGARDING CONTESTED CASE
Family Residence Project and Proposed)	HEARING
Consolidation, Haena, Island of Kauai,)	
TMK Nos. (4) 5-9-003:010 and 045)	
)	
)	
)	
)	

SETTLEMENT AGREEMENT REGARDING CONTESTED CASE HEARING

Respondent State of Hawaii, Department of Land and Natural Resources, by and through its Office of Conservation and Coastal Lands, and Petitioners David M. and Linda B. Morrow, by and through their counsel Roy A. Vitousek III, Esq., in the above-captioned case involving a petition contesting staff's findings and recommendations regarding a Conservation District Use Application relating to TMK: (4) 5-9-003:010 and 045, hereby stipulate to the following settlement terms and conditions:

1. On September 26, 2006, Petitioners submitted a Conservation District Use Application (CDUA) requesting a permit to build a single family residence and consolidation on TMK: (4) 5-9-003:010 and 045, as provided therein.

2. On July 13, 2007 the Board of Land and Natural Resources denied the CDUA and Petitioners requested a contested case hearing thereon in accordance with HAR §§13-1-29 and 13-5-34(d).

3. Subsequently, Petitioners David M. and Linda B. Morrow ("Petitioners") had requested and received a boundary determination pursuant to HAR §13-5-17 from Respondent State of Hawaii, Department of Land and Natural Resources ("Respondent" or "Department") (collectively "the Parties"). A true and accurate copy of the boundary determination rendered by Respondent is attached hereto as Exhibit A.

4. Petitioners have submitted a revised site plan, a true and accurate copy of which is attached hereto as Exhibit B. As depicted on Exhibit B, the proposed single family residence is located wholly within the Resource subzone.

5. Pursuant to HAR §13-5-24(c) R-8, a single family residence that conforms to the design standards set forth in the Exhibit 4 to the rules may be allowed pursuant a permit issued by the Board.

6. Respondent recommends issuance of a Conservation District Use Permit allowing for the construction of a single family residence as shown on Exhibit B, and consolidation of parcels TMK: (4) 5-9-003:010 & 045, subject to the following terms and conditions:

- 1) The applicant shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the federal, State and county governments, including the single family residential standards identified in Exhibit 4 of Chapter 13-5, HAR, and the County of Kauai's Flood Ordinance Standards and Building Permit requirements;

- 2) The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
- 3) The applicant shall comply with all applicable Department of Health administrative rules;
- 4) The single-family dwelling shall not be used for rental or any other commercial purposes unless approved by the Board;
- 5) The applicant shall provide documentation (e.g., book and page, or document number) that the permit approval has been placed in recordable form as part of the deed instrument, prior to submission for approval of subsequent construction plans;
- 6) Before proceeding with any work authorized by the Board, the applicant shall submit four copies of the construction plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three copies of the plans and specifications will be returned to the applicant. Plan approval by the Chairperson does not constitute approval required from other agencies;
- 7) The structure shall be setback at least 70 feet from the shoreline;
- 8) Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact the State Historic Preservation Division (808 692-8015), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary;
- 9) Data recovery shall be conducted on site 670 as approved in the data recovery plan (Rechtman, 2006). Hand excavation units will be done to conduct the sampling strategy in locations of the footings, utilities, septic, and leach field areas. We also recommend that wood taxa identification be conducted on dateable material;
- 10) A draft data recovery report shall be submitted 160 days after the completion of fieldwork for review and approval to the State Historic Preservation Division;
- 11) No breakaway walls shall be installed on the bottom section of the dwelling at any time;

- 12) Any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been approved by the Department of Land and Natural Resources (Department), and unless otherwise authorized, shall be completed within three years of the approval. The applicant shall notify the Department in writing when construction activity is initiated, and when it is completed;
 - 13) All mitigation measures set forth in the application materials and in the final environmental assessment for this project are hereby incorporated as conditions of the permit;
 - 14) The applicant understands and agrees that this permit does not convey any vested rights or exclusive privilege;
-
- 15) In issuing this permit, the Department and Board have relied on the information and data that the applicant has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
 - 16) Potable water supply and sanitation facilities shall have the approval of the appropriate agencies;
 - 17) Where any polluted run-off, interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the polluted run-off, interference, nuisance, harm, or hazard;
 - 18) The applicant shall plan to minimize the amount of dust generating materials and activities. Material transfer points and on-site vehicular traffic routes shall be centralized. Dusty equipment shall be located in areas of least impact. Dust control measures shall be provided during weekends, after hours and prior to daily start-up of project activities. Dust from debris being hauled away from the project site shall be controlled. Landscaping and dust control of cleared areas will be initiated promptly;
 - 19) During construction, appropriate mitigation measures shall be implemented to minimize impacts to the marine environment, off-site roadways, utilities, and public facilities;
 - 20) Cleared areas shall be re-vegetated within thirty days of the completion of construction unless otherwise provided for in a plan on file with the Department;
 - 21) The applicant acknowledges that the approved work shall not hamper, impede or otherwise limit the exercise of traditional, customary or religious practices in the

immediate area, to the extent such practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;

- 22) No subdivision of the lot is allowed;
 - 23) Artificial light from exterior lighting fixtures, including, but not necessarily limited to floodlights, uplights or spotlights used for decorative or aesthetic purposes shall be prohibited if the light directly illuminates, or is directed to project across property boundaries toward the shoreline and ocean waters, except as may be permitted pursuant to Section 205A-71, Hawaii Revised Statutes;
 - 24) All landscaped areas, landscaping and irrigation shall be contained and maintained within the property, and shall under no circumstances extend seaward of the shoreline as defined in Section 205A-1, Hawaii Revised Statutes;
-

- 25) The landowner shall execute a waiver and indemnity agreement prior to construction plan approval that is satisfactory to the Department;
- 26) The landowner shall file a final consolidation map with the Department;
- 27) Other terms and conditions as may be prescribed by the Chairperson; and
- 28) That failure to comply with any of these conditions shall render this Conservation District Use Permit null and void.

7. The Parties agree that this settlement agreement has been entered into for purposes of compromise and that nothing herein shall be construed as a finding of liability, wrongdoing, or guilt on the part of either Petitioners or Respondent;

8. The Parties understand and agree that this settlement agreement is conditioned on approval by the Board of Land and Natural Resources and its representative counsel from the Department of the Attorney General, State of Hawaii (Attorney General);

9. In the event that either the Board of Land and Natural Resources or the Attorney General do not agree to the settlement terms and conditions as stated herein, and subsequently issue a Conservation District Use Permit subject to the terms and conditions set forth in Part 6,

above, the Parties agree to the resumption of their rights and positions in the above-captioned contested case proceeding;


10. Each signatory to this settlement agreement hereby represents and warrants that he or she is authorized to execute and deliver this settlement agreement in the capacity shown on the signature page hereof;

11. The Parties further understand and agree that other than those terms and conditions that are expressly contained herein, there are no promises, representations, understandings or warranties;


12. The Parties agree that each party shall bear its own attorneys' fees and costs;

13. Upon approval and execution of this settlement agreement by the Board of Land and Natural Resources, and concurrence by the Attorney General and issuance of a Conservation District Use Permit subject to the terms and conditions set forth in Part 6, above,, the above-referenced contested case will be dismissed with prejudice.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed on this day
JUN 27 2008
_____, 2008.

By 
LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

APPROVED AS TO FORM:

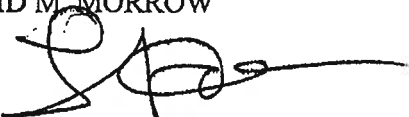

Deputy Attorney General

6/11/08

DATED: _____, Hawaii, _____, 2008.

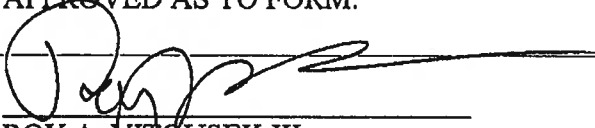


DAVID M. MORROW



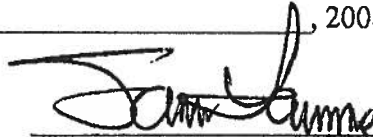
LINDA B. MORROW

APPROVED AS TO FORM:



ROY A. VITOUSEK III
Attorney for Petitioners
David M. and Linda B. Morrow

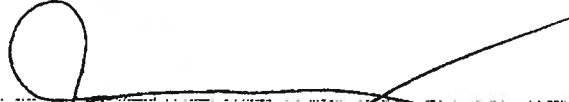
DATED: Honolulu, Hawaii, _____, 2008.



SAMUEL J. LEMMO
Office of Conservation and Coastal Lands
Department of Land and Natural Resources

DATED: Honolulu, Hawaii, 6/24/08, 2008.

RON AGOR
Boardmember




JERRY EDLAO
Boardmember



SAMUEL M. GON, III, Ph.D.
Boardmember


TIMOTHY JOHNS
Boardmember

ROBERT PACHECO
Boardmember


TARYN R. SCHUMAN
Boardmember

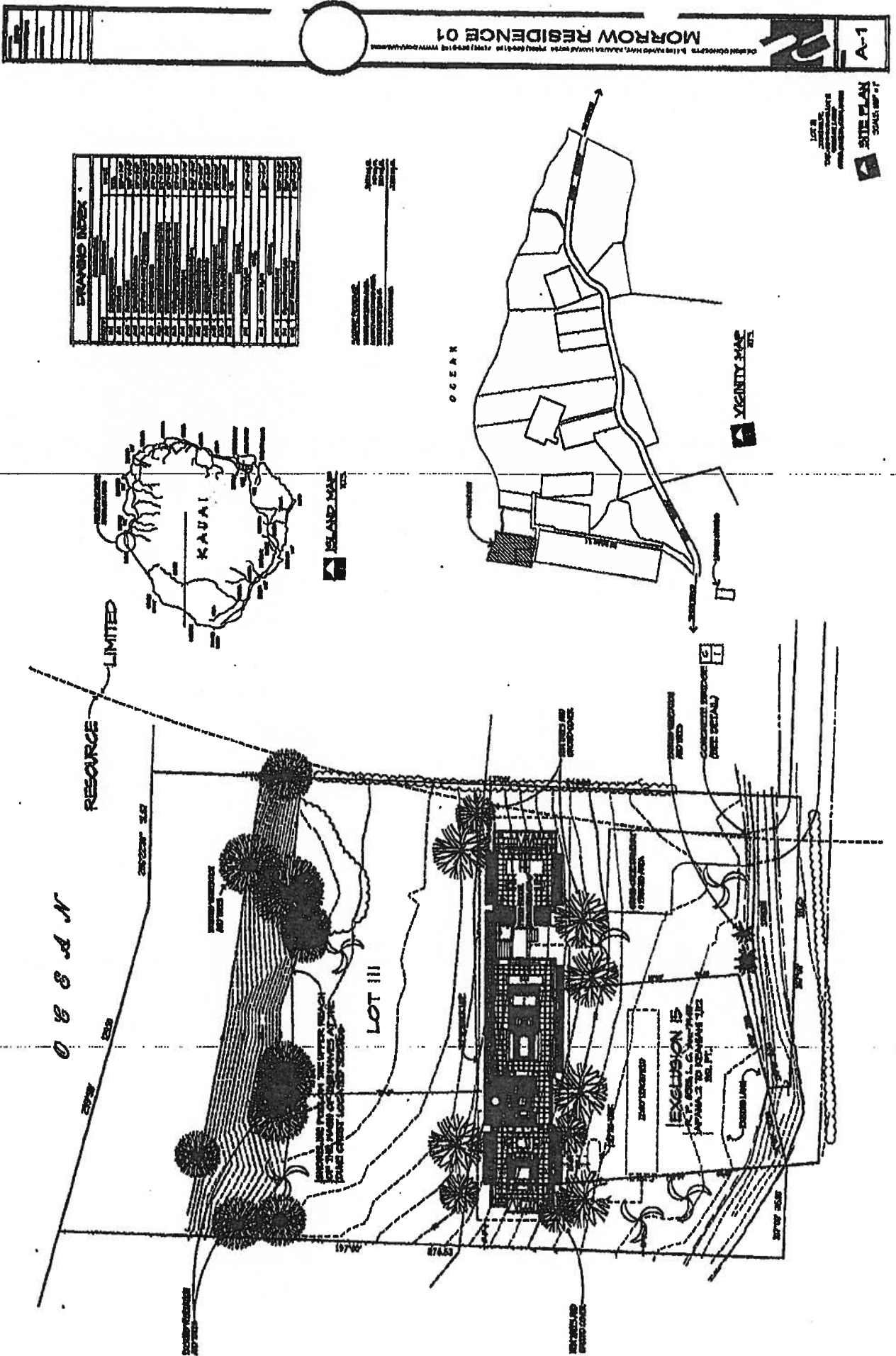


FIGURE 4-C Site Plan with Subzone Boundary

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

Office of Conservation and Coastal Lands
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LADRA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUN
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES INFORMATION
DIVISION

FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAUAI/OLAHU ISLAND BUREAU COMMISSION
LAND
STATE PARKS

SANTO GIORGIO
P.O. Box 593 Kilauea
Kauai, Hawaii, 96754

DEC - 9 2008

Subject: Conservation District Use Permit KA-3399 for the Morrow Living Trust Single
Family Residence at Haena, Kauai, TMK: (2) 5-9-003:010 & 45

Dear Mr. Giorgio:

This is to confirm that construction plans for the subject residence were approved on September 9, 2008.

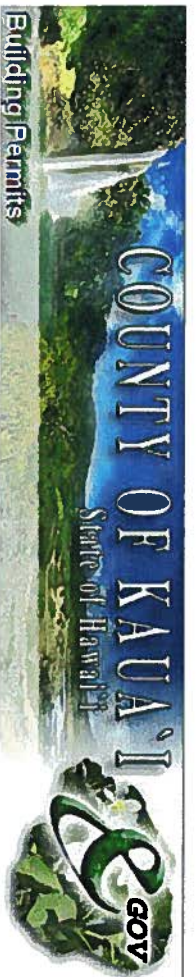
Please contact me at 587-0381 should you have any questions on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel J. Lemmo".

Samuel J. Lemmo, Administrator

EXHIBIT "3"



Plan Tracking Status

Select a plan below, to view agency comments.

- Home
- Select Permit
- Status Detail
- View Application
- Fees
- Permit Status
- Inspection Status
- Plan Tracking Status
- Help
- Log Off

Parcel ID: 5-9-003-010 Owner: MORROW, DAVID
 Address: 5-8304 KUHIO HWY L Application Type: SINGLE FAMILY RESIDENCE
 Application #: 08 - 2094 Application Date: 10/30/08

Agency Description	Key Dates		Action Summary		
	In	Last	Type	By	
PLANNING DEPT	11/05/08	12/18/08	CMP	WM	
DEPT OF WATER	12/23/08	12/31/08	CMP	KK	
APPLICANT-WATER	12/31/08	02/02/09	CMP	GV	
DEPT OF HEALTH (STATE)	10/30/08	02/02/09	CMP	LV	
BLDG-BLDG INSPECTONAL	01/06/09	01/12/09	CMP	RD	
APPLICANT-BUILDING	01/12/09				
	01/12/09	01/30/09	CMP	MTA	
DEPT OF WATER	02/02/09	02/03/09	CMP	KK	
APPLICANT-WATER	02/03/09				

Please allow 5 business days after Building Division approval to pick up your permit. The Building Division will call you to let you know your permit is ready to pick up, and notify you of the payment amount due.

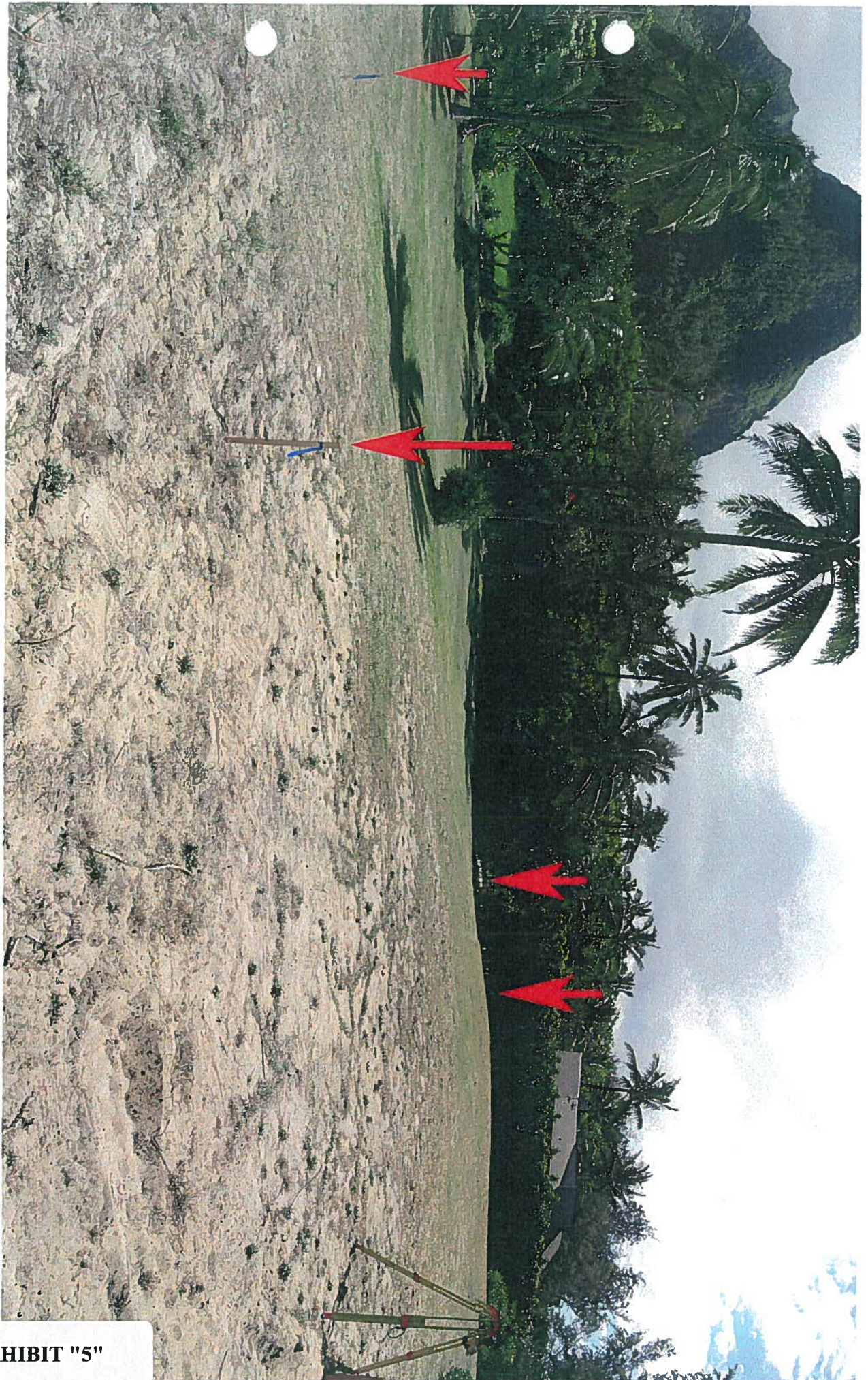


EXHIBIT "5"



EXHIBIT "6"